

2015

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## Recommended Citation

Risinger, Ariel, "The Romani in Europe and the False Promise Fundamental Rights" (2015). *Law School Student Scholarship*. 673.  
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# THE ROMANI IN EUROPE AND THE FALSE PROMISE FUNDAMENTAL RIGHTS

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Fall 2013 - Comparative Law and Religion  
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“Those who shed tears of compassion for the Negroes of Africa, of whom the American makes its slaves, should give a kind thought to this short history of the Gypsies of India, of whom the European monarchies make their ‘Negroes’. These mean, wanderers from Asia, will never again be itinerant; these slaves shall be *free*.”

-- J.A. Vaillant, writing after the Romani slaves of Moldavia and Wallachia were freed in 1855.<sup>1</sup>

## INTRODUCTION

Although Romania and Bulgaria acceded to the European Union in 2007, certain Member States have restricted their citizens' ability to obtain employment by requiring Romanians and Bulgarians to obtain work permits before being granted residency. These restrictions will expire on January 1, 2014, allowing millions of Bulgarian and Romanian citizens to work without a work permit in France, Germany, and Spain, among other Member States. Unfortunately, the impending change of law has brought a wave of anti-Romani rhetoric from Western European countries,<sup>2</sup> as many Romani are citizens of Romania and Bulgaria. France has been the most vocal in this regard. Indeed, France implemented an aggressive collective expulsion scheme in 2010, specifically targeting Romani communities.

The Romani have been subject to brutal treatment in Europe since their arrival from India in the thirteenth century. As victims of genocide, racism, and cruel stereotypes, the Romani have been prevented from not only fully realizing their legal rights as citizens of European Union, but

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<sup>1</sup>IAN HANCOCK, WE ARE THE ROMANI PEOPLE 26 (2002) [hereinafter Hancock].

<sup>2</sup>Steven Erlanger, *Treatment Still Harsh for Roma in France*, N.Y. TIMES, June 4, 2013, at A4, available at [http://www.nytimes.com/2013/06/04/world/europe/roma-still-shunned-in-france-ahead-of-eu-rules-change.html?\\_r=0](http://www.nytimes.com/2013/06/04/world/europe/roma-still-shunned-in-france-ahead-of-eu-rules-change.html?_r=0) (“[T]he coming change has led to new fears of a large influx of poor workers and criminals seeking to take jobs from citizens and benefit from lavish social welfare systems.”).

also their equality and dignity as human beings. Because they are denied access to basic needs, fundamental rights, and live in constant fear of expulsion by local authorities, Romani families and communities are left with few options to support themselves. As a result some turn to crime, such as pickpocketing and petty theft. In turn, such activities perpetuate stereotypes that have plagued the Romani for centuries: that the Romani are dirty thieves uninterested or unwilling to integrate into the larger society of the country in which they live.<sup>3</sup>

As a matter of policy and politics, the European community recognizes the need to include the Romani more fully within larger society and increase their participation in education, employment, access to health care and employment.<sup>4</sup> These goals are becoming more imperative as the Romani population continues to grow and the non-Romani population ages. Despite this recognition, the European Commission fails to take any concrete legal action against Member States that continue to discriminate openly against the Romani. The most significant judicial relief for the Romani has come from the European Court of Human Rights (“ECtHR”), and more recently a decision out of the European Committee for Social Rights holding France’s expulsions in violation of the European Social Charter.<sup>5</sup>

This paper will examine the legal avenues and remedies available under Union law in the context of France’s collective expulsions of the Romani beginning in 2010. Part One will broadly discuss the history of the Romani in Europe. Part Two will discuss the collective

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<sup>3</sup>*ERRC Condemns Hitler Hate Speech Against Roma*, Eur. Roma Rights Ctr., (Jul. 24, 2013), <http://www.errc.org/article/errc-condemns-hitler-hate-speech-against-roma/4173> (“irritant and smelly”); Erlanger, *supra* note 2 (“These are people who sell themselves, who racketeer, who construct criminal networks, and their way of life is totally incompatible with that of our modern societies.”)

<sup>4</sup>*See generally* Eur. Comm., National Roma Integration Strategies, A First Step in Implementing the EU Framework, COM (2012) 226 (2012), available at [http://ec.europa.eu/justice/discrimination/files/roma\\_nat\\_integration\\_strat\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/roma_nat_integration_strat_en.pdf) [hereinafter Roma Integration Strategy]. The Roma Integration Strategy is aimed at integrating the Romani into the broader society by increasing access to housing, education, healthcare and employment. But there is no “European” mechanism for implementation and it is up to the member states who have signed the initiative to decide how it will implement the goals.

<sup>5</sup>*ERTF v. France*, Judgment on the Merits, Complaint no. 64/2011 (Eur. Comm. of Social Rts., Jan. 24, 2012), [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC64Merits\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC64Merits_en.pdf)

expulsions of the Romani in France and the violations of EU directives. Part Three will discuss the limitations of the EU system in enforcing fundamental rights. Part Four will conclude that the EU fundamental rights provisions are not the promise of equal protection they seem to be.

## **PART I THE ROMANI IN EUROPE**

A brief history of the Romani contained within a short legal commentary cannot do justice to the colorful and often terrifying history of this people in Europe. But it is necessary a journey in order to understand the deep-seeded racism that persists throughout Europe today and the way the law is used against this people in order to continually marginalize them.

### **A. A Long Way From Home: From Indian Warriors to Balkan Slaves and Holocaust Victims**

The Romani first arrived in Europe from India during the end of the thirteenth century.<sup>6</sup> Because of their darker skin and “non-Western” traditions and language, Europeans thought the Romani were Turks or Egyptian.<sup>7</sup> This misconception of Romani origin led to them being called “Sacacen” – for Turk – or, more famously, “Gypsy,” a shortened version of “Egyptian.”<sup>8</sup> It was not until the eighteenth century that a Dutch student familiar with the Romani language, overheard a group of exchange students from Malabar, India speaking Sanskrit and realized the similarities between the Romani and Sanskrit.<sup>9</sup> The Dutch student told a friend, who told a friend,<sup>10</sup> and the story circulated for sixteen years until 1776, when it was published in the

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<sup>6</sup>HANCOCK, *supra* note 1 at 1.

<sup>7</sup>*Id.* at 1-2.

<sup>8</sup>*Id.* The terms “Gypsy”, “Traveler”, “Ziegeuer” (German for “don’t touch”) and “Gitano” (Spanish version of “Gypsy”) are considered a derogatory terms by the Romani. According to Professor Hancock, all sub-groups of Romani identify collectively as “Romani.” As such, “Romani” will be used in this text unless there is a historical or contextual purpose to use another term.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

*Vienna Gazette*.<sup>11</sup> Once Europeans realized that the Romani were of Indian origin and not Turkish or Egyptian, as previously thought, scholars and linguists began to investigate how and why the Romani left India.

Through linguistic analysis, historical documents, cultural and religious observation, it is generally thought that the Romani are descendants from the Rajputs in Northern India.<sup>12</sup> “[T]he majority of Roma[ni], before migrating from India, formed a vital part of the upper strata of the Indian population, like Rjaputs or Kshatriyas or Jats.”<sup>13</sup> At the beginning of the eleventh century, the Romani left Northern India, either as slaves of the Seljuks or to avoid the spread of Islam, and traveled west, “comparatively rapidly, in fifty years or less,” and eventually settled in what is today Turkey and Greece.<sup>14</sup> They forced to move as the Ottoman Empire expanded towards Europe.<sup>15</sup> Many Romani arrived in Balkans in the thirteenth century via, “the Ottoman invasion: either as direct participants, [] as servants in the auxiliary detachments, [] as craftsmen servicing the army, or with the accompanying Turkish population.”<sup>16</sup>

Once in the Balkans, the Romani were enslaved in the Ottoman-occupied territories of Wallachia and Moldavia for almost 500 years with few, if any, legal rights because of their status as slaves, foreigners and non-Muslims.<sup>17</sup> Legislation – “*rept țigan* or ‘rights over Romanies’” – was passed to protect slave owners cruel treatment of their Romani slaves and by the 1500’s the word *țigan* specifically came to mean “Romani slave.”<sup>18</sup> Romani slavery in Wallachia and

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<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 6-14.

<sup>13</sup>*Id.* at 14.

<sup>14</sup>*Id.* at 14-15

<sup>15</sup>*Id.* at 15-16.

<sup>16</sup>*Id.* at 15. (internal citation omitted).

<sup>17</sup>*Id.* at 16, 18.

<sup>18</sup>*Id.* at 18

Moldavia was not officially abolished until December 23, 1855, when the Moldavian assembly unanimously passed a resolution to end slavery.<sup>19</sup>

But Romani slavery was not isolated to Easter Europe. The Romani were enslaved throughout Europe, notably Spain, Russia, and England, and were part of the slave trade to the New World.<sup>20</sup> For example, during the eighteenth century, Spain shipped Romani slaves to Louisiana and, “[a]n Afro-Romani community today lives there in St. Martin’s Parish[.]”<sup>21</sup>

Those Romani not enslaved during this period were often met with suspicion throughout Europe because of their darker complexions, different language and non-European culture.<sup>22</sup> Because of Romani beliefs about spiritual cleanliness and balance, it tends to be an exclusionary culture.<sup>23</sup> Romani are discouraged from interacting with non-Romani<sup>24</sup> (“*gadže*”) because interacting with non-Romani drains one’s spiritual energy.<sup>25</sup> When one’s spiritual energy is drained ancestral spirits will give warning signals or small punishments, like a stubbed toe or even illness.<sup>26</sup> The “universal Romani belief” is that nothing happens by chance or accident.<sup>27</sup> These warning signs from ancestral spirits can even come from socializing with people who are not *vuže*, or clean.<sup>28</sup> It is important to note that Romani do think non-Romani are inherently unclean: non-Romani are unclean because they do not engage in the practices that would make

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<sup>19</sup>*Id.* at 25.

<sup>20</sup>*Id.* at 26. Additional examples: in England, King Edward passed a law that branded Romanies with a V on their chest and enslaved them for two years. If they escaped and were recaptured, they were branded with an S and became slaves for life; in Russia, the Romani were made Slaves of the Crown; and in Portugal, the Romani were shipped to what is now Brazil.

<sup>21</sup>*Id.* at 27.

<sup>22</sup>*Id.* at 29-30.

<sup>23</sup>*Id.* at 58.

<sup>24</sup>*Id.* at 58, 75 (“Time spent in the non-Romani world drains spiritual energy.”)

<sup>25</sup>*Id.* at 75.

<sup>26</sup>*Id.* at 75-76.

<sup>27</sup>*Id.* at 76.

<sup>28</sup>*Id.*

them *vuže*.<sup>29</sup> “The maintenance of cultural and/or religious restrictions that keep outsiders at a distance must certainly be seen as one major historical factor accounting for [] antigypsyism[.]”<sup>30</sup>

After centuries of slavery and discrimination, the Romani were then subjected to Hitler’s “Final Solution” during the Third Reich.<sup>31</sup> Called *Baro Porrajmos* in Romani, or “the Great Devouring,” Romani, like the Jews, were specifically targeted by the Nazis for “extermination” and sent off to concentration camps.<sup>32</sup> It is only in recent that the extent of the Nazi persecution of the Romani been studied, with scholars estimating between 500,000 to 1.5 million Romani murdered by the Nazis.<sup>33</sup>

## **B. Continued Discrimination in Europe**

A history of slavery, persecution and genocide has left its mark on the Romani today. Romani Holocaust survivors have been all but forgotten by society. “International humanitarian and social assistance for non-Jewish Holocaust victims is a new and particularly challenging undertaking...Many [break] into tears when receiving aid [such as firewood or coal], in most cases the first, albeit meagre [sic], recognition of their suffering in nearly 60 years.”<sup>34</sup> Today, younger Romani have high levels of unemployment<sup>35</sup>, shorter lifespans<sup>36</sup> and lower education

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<sup>29</sup>*Id.*

<sup>30</sup>*Id.* at 58.

<sup>31</sup>*Id.* at 34.

<sup>32</sup>*Id.* *Baro Porrajmos* can also mean “rape” and “gaping” in shock and horror.

<sup>33</sup>Bernard Rorke, *Porrajmos: Remembering Dark Times*, OPEN SOCIETY (Aug. 3, 2012), <http://www.opensocietyfoundations.org/voices/porrajmos-remembering-dark-times> (500,000 victims); Carol Silverman, *Persecution and Politicization: Roma (Gypsies) of Eastern Europe*, 19 CSQ 2 (1995), available at <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/albania/persecution-and-politicization-roma-gypsies-eastern#sthash.hdroQF87.dpuf> (600,000 victims); Hancock, *supra* 1 at n. 28 (“half-a-million to million-and-a-half”) (internal citations omitted).

<sup>34</sup>Int’l Org. for Migration, *Final Report on Assistance to Needy, Elderly Victims of Nazi Persecution, Humanitarian and Social Programs* 200 (2006).

<sup>35</sup>Roma Integration Strategy, *supra* note 4, at n. 12.

<sup>36</sup>Fundación Secretariado Gitano Health Area, *Health and the Roma Community, Analysis of the Situation in Europe: Bulgaria, Czech Republic, Greece, Portugal, Romania, Slovakia, Spain* 17-18 (2009), [http://ec.europa.eu/justice/discrimination/files/roma\\_health\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/roma_health_en.pdf).

levels<sup>37</sup> compared to non-Romani. Poverty amongst Romani is as high as 90% in some Member States.<sup>38</sup>

Additionally, the Romani often live in squalid conditions outside towns and cities.<sup>39</sup> Their “homes” are often constructed from, “flimsy, salvaged materials.”<sup>40</sup> There is no running water or electricity. Holes in the ground serve as toilets.<sup>41</sup> Because many settlements are illegal, trash is not picked up by the government.<sup>42</sup> “In some places garbage at the roadside has been there so long that it has become compacted, sometimes forming what appears to be a thick wall.”<sup>43</sup>

Romani individuals regularly face discrimination and are often denied access to education, housing, jobs and healthcare.<sup>44</sup> As a result, some Romani turn to prostitution and pick pocketing to survive.<sup>45</sup> These petty crimes, rampant poverty and squalid living conditions perpetuate a vicious cycle of suspicion and hatred towards the Romani, exemplified by their treatment in France.<sup>46</sup>

### C. France’s Mass Expulsions of the Romani

In 2010, French President Nicholas Sarkozy began a campaign of targeted mass expulsions of the Romani, much to the concern and condemnation of the international

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<sup>37</sup>Eur. Comm., *Roma and Education, Challenges and Opportunities in the European Union*, 17, 19 (2012), <http://bookshop.europa.eu/en/roma-and-education-pbNC3111389/>

<sup>38</sup>*Id.* at 17.

<sup>39</sup>Eur. Roma Rights Ctr., *France: Country Profile, 2011-2012*, at 7, <http://www.errc.org/cms/upload/file/france-country-profile-2011-2012.pdf>. [herein after *France Country Profile*].

<sup>40</sup>Jack Greenberg, *Report on Roma Education Today: From Slavery to Segregation and Beyond*, 110 COLUM. L. REV. 919, 932 (2010).

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>*France Country Profile*, *supra* note 39; Amnesty Int’l, *Submission to the European Commission on the Implementation of the Equality Directives*, IRO 61/002/2013, 3 (Jan. 2013).

<sup>45</sup>Steven Erlanger, *Treatment Still Harsh for Roma in France*, N.Y. Times, June 4, 2013, at A4.

<sup>46</sup>*Id.* (“These are people who sell themselves, who racketeer, who construct criminal networks, and their way of life is totally incompatible with that of our modern societies.”)



community,<sup>47</sup> the Council of Europe,<sup>48</sup> and Viviane Reding, Vice-President of the European Commission.<sup>49</sup> During his speech in Grenoble on July 30, 2010, Sarkozy stated that of the 539 Romani camps in France, half would be gone within three months.<sup>50</sup> By August 22, 80 camps had been dismantled and hundreds of Romani from Romania and Bulgaria were sent back to their member state of origin by the plane load.<sup>51</sup> France claimed it was “scrupulously” following Union law as each person “voluntarily” left and was given airfare back to Romania and Bulgaria and 300€ per adult and 100€ per child as compensation.<sup>52</sup> The Commission did not agree with France, especially after an August 5, 2010 circular from the French Interior Minister Besson dated August 5, 2010 (“August Circular”) was released in September 2010 that outlined the procedures for the expulsions, noting that traveler and Romani camps were a priority.<sup>53</sup>

In September 2010, Commissioner Reding threatened to bring infringement action France for violations of the Free Movement Directive and, “lack of transposition of the procedural and

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<sup>47</sup>See Amnesty Int’l, *France President Urged Not to Stigmatize Roma and Travellers* (July 23, 2010), <http://www.amnesty.org/en/news-and-updates/france-president-urged-not-stigmatize-roma-and-travellers-2010-07-23>; *UN Urges France to Avoid Roma Deportations*, BBC (Aug. 27, 2010), <http://www.bbc.co.uk/news/world-europe-11113163>; Ullrich Fichter, *Driving Out the Unwanted: Sarkozy’s War Against the Roma*, DER SPIEGEL ONLINE (Sept. 15, 2010), <http://www.spiegel.de/international/europe/driving-out-the-unwanted-sarkozy-s-war-against-the-roma-a-717324-2.html> (“Pope Benedict XVI voiced his criticism of the policy from his summer residence in Castel Gandolfo[.]”).

<sup>48</sup>*Statement by the Eur. Comm. Against Racism and Intolerance on the Situation of Roma Migrants in France* 608(2010) (Aug. 24, 2010), <https://wcd.coe.int/ViewDoc.jsp?Ref=PR608%282010%29&Language=lanEnglish&Ver=original&BackColorIntranet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>.

<sup>49</sup>Statement By Viviane Reding On The Recent Developments Concerning The Respect For EU Law As Regards The Situation Of Roma In France, MEMO/10/502 (Oct. 19, 2010), [http://europa.eu/rapid/press-release\\_MEMO-10-502\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-10-502_en.htm?locale=en).

<sup>50</sup>Fichter, *supra* note 47.

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*; Erlanger, *supra* note 2; *UN Urges France to Avoid Roma Deportations*, *supra* note 47.

<sup>53</sup>Circulaire from Le Ministre de l’Intérieur, de l’Outre-mer et des Collectivités territoriales to M. le Préfet de police, M. le Directeur général de la police nationale, M. le Directeur général de la gendarmerie nationale, Mm. et Mms. les Préfets (Aug. 5, 2010), [http://www.lecanardsocial.com/upload/IllustrationsLibres/Circulaire\\_du\\_5ao%C3%BBt\\_2010.pdf](http://www.lecanardsocial.com/upload/IllustrationsLibres/Circulaire_du_5ao%C3%BBt_2010.pdf) [hereinafter August Circular].

substantive guarantees under the Free Movement Directive.”<sup>54</sup> She called France’s expulsions of the Romani “a disgrace.”<sup>55</sup> But by October, Reding had withdrawn the preliminary proceedings because, “French authorities submitted detailed documentation...[including] draft legislative measures and a credible calendar for putting the procedural safeguards required under the EU’s Free Movement Directive...France has done thus done what the Commission has asked for.”<sup>56</sup>

Except France has not done anything the Commission has asked for, i.e. stop targeting EU citizens for mass expulsion based on race or nationality. Under President Hollande, France continued to make headlines for its targeted expulsions of the Romani in 2012 and 2013.<sup>57</sup> French Interior Minister Manuel Valls has taken up Sarkozy’s mantle by continuing to expel the Romani from France,<sup>58</sup> stating, “The majority [of Roma] should be delivered back to the borders. We are not here to welcome these people.”<sup>59</sup>

#### **D. France is Not An Island: Racism of Epidemic Proportions**

While this paper will focus primarily on France’s actions towards the Romani because they are the most well-documented, heavily scrutinized and raise possible violations under both EU law and the ECHR, France is by no means the only Member State that is guilty of targeting the Romani for discriminatory practices. Indeed, the Council of Europe noted in 2010 that, “[it]

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<sup>54</sup>Statement by Viviane Reding on the Latest Developments in the Roma Situation, Brussels, SPEECH/10/428 (Sept. 14, 2010), [http://europa.eu/rapid/press-release\\_SPEECH-10-428\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-10-428_en.htm).

<sup>55</sup>*Id.*

<sup>56</sup>Reding Statement, note 49.

<sup>57</sup>Erlanger, *supra* note 2. (“Having criticized the previous center-right government of Nicolas Sarkozy for being careless with individual rights and flirting with the anti-immigrant far right, the Hollande government has done little to change policy toward the Roma. The interior minister, Manuel Valls, who has been praised for his organizational ability and toughness, has *expelled at least as many non-French Roma as his predecessor* and continues to order the police to dismantle illegal camps and shantytowns, without rehousing most of those displaced.”) (emphasis added).

<sup>58</sup>*Id.*

<sup>59</sup>*French Minister Valls Defends Calls for Roma Expulsion*, BBC (Sept. 23, 2013) <http://www.bbc.co.uk/news/world-europe-24273380>.

is shocked by recent outrages against Roma in several Council of Europe member states, reflecting an increasing trend in Europe towards anti-Gypsyism of the worst kind.”<sup>60</sup>

In 2013, three years after the Council’s statement, the situation is not any better for the Romani. For example, in November 2013, Italy forcefully evicted about 700 Romani from the Montefeltro/Brunetti area of Milan, interrupting some 200 children’s education in the local schools and not providing alternative accommodation, leaving many Romani homeless or forced to find “informal accommodation.”<sup>61</sup> In October 2013, authorities in Eforie, Romania demolished a Romani settlement, leaving 100 people, including fifty-five children, homeless.<sup>62</sup> In September 2013, a Swedish newspaper uncovered the existence a secret police database of genealogical information of more than 4,000 Romani living in Sweden made headlines.<sup>63</sup> These instances of Romani racism, including the previously discussed situation in France, are but a drop in the bucket of the situation for the Romani in the EU and, “reminiscent of the darkest hours in Europe’s history.”<sup>64</sup>

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<sup>60</sup>EUR. PARL. ASS., *The Situation of Roma in Europe and Relevant Activities of the Council of Europe*, Resolution 1740 (2010); see Sarah Doughtry, *14 Unbelievably Racist Things European Politicians Are Saying About the Roma*, GLOBALPOST.COM (Nov. 21, 2013, 00:39), <http://www.globalpost.com/dispatch/news/regions/europe/131118/14-unbelievably-racist-things-politicians-said-about-roma> (compilation of statements from European leaders on the Romani).

<sup>61</sup>Eur. Roma Rights Ctr., *Forced to be Nomads: Milan Prefers to Evict Rather Than Integrate* (Nov. 25, 2013), <http://www.errc.org/article/forced-to-be-nomads-milan-prefers-to-evict-rather-than-integrate/4230>.

<sup>62</sup>Eur. Roma Rights Ctr., *Romania Eviction Leaves 100 People Homeless in Dangerous Conditions – Authorities Must Act Urgently* (Oct. 2, 2013), <http://www.errc.org/article/romania-eviction-leaves-100-people-homeless-in-dangerous-conditions-%E2%80%93-authorities-must-act-urgently/4204>.

<sup>63</sup>Sven Nordenstam & Anna Ringstrom, *Police Database of Roma Stirs Outrage in Sweden*, REUTERS (Sept. 23, 2013, 7:03 AM), <http://www.reuters.com/article/2013/09/23/us-sweden-roma-idUSBRE98M0EM20130923>.

<sup>64</sup>EUR. PARL. ASS., *surpa* note 60.

## PART II VIOLATIONS OF ROMANI RIGHTS UNDER EU LAW

The history and current experiences of the Romani in Europe can be compared to that of African Americans in the United States. As Professor Greenberg observes:

For much of their histories, the Roma of Eastern Europe and African Americans traversed similar paths. Both endured centuries of slavery and were emancipated, almost simultaneously during the mid-nineteenth century. Both continued to suffer years of discrimination, poverty, inferior housing, and segregated education.<sup>65</sup>

In contrast to the African American experience, there is no official sanction of “separate, but equal”<sup>66</sup> towards the Romani under EU law. Despite the deep-seeded racism in Europe on all levels of society, the Romani do not have to wait for an official declaration of their “equality” as African Americans did in *Brown v. Board of Ed.*,<sup>67</sup> which “confronted the *legal* underpinnings of segregation in order to change the law,”<sup>68</sup> and, consequently, society. In contrast, there are no legal barriers erected to prevent the Romani from being equal to non-Romani. The Romani, like any EU citizen, have the right to be free from racial and cultural prejudice. They have the same right to work, travel and go to school. The barriers are not laws, but the abusive application of favorable laws.

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<sup>65</sup>Greenberg, *supra* note 40, at 924-25; *see also* D.H. v. Czech Republic, 47 Eur. H.R. Rep. 3 (holding that the Czech Republic illegally segregated Romani school children); *see discussion infra* Part III. D.H is considered by many Romani rights scholars the Romani *Brown*. The ECtHR’s judgment is certainly welcome, but is by no means seminal in the way *Brown* is. The weakness of D.H. is that the ECtHR does not have the enforcement power of the Supreme Court and, as Professor Greenberg’s research has shown, not much has improved “on the ground” since the decision.

<sup>66</sup>*Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (“Laws permitting, and even requiring, [racial] separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.”).

<sup>67</sup>*Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal.”); *see also*, Greenberg, *supra* note 40, at 940.

<sup>68</sup>Greenberg, *supra* note 40, at 941-42 (emphasis added).

This section will discuss France's violations of the Free Movement and Race Equality Directives that are actionable by the Commission under Article 258 TFEU and the limitations of fundamental rights under EU law. Article 258 allows the Commission to bring an infringement proceeding against a Member State it considers has, "failed to fulfill an obligation under the Treaties."<sup>69</sup> The Member State is then given time to respond and "submit its observations" and the Commission then gives a "reasoned opinion" on the matter.<sup>70</sup> If the Member State does not comply with the Commission's opinion, the Commission may bring the matter before the CJEU.<sup>71</sup>

Politically, it is something the Commission has not been willing to do,<sup>72</sup> despite recognizing egregious abuses of fundamental rights and EU law and calls from the European and international human rights communities for change.

#### **A. France's Violations of the Freedom of Movement – Directive 2004/38**

In its broadest conception, Directive 2004/38 ("Free Movement Directive") confers upon every EU citizen and their family members the right, "to move and reside freely within the territory of the Member States[.]"<sup>73</sup> The Free Movement Directive applies to Member States through Article 40, which requires that Member States have two years from the Directive's entry into force<sup>74</sup> to, "bring into force the laws, regulations and administrative provisions necessary to comply with this Directive...[and] shall contain a reference to this Directive[.]"<sup>75</sup>

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<sup>69</sup>Consolidated Version of the Treaty of the Functioning of the European Union art. 258, March 30, 2010, 2008 O.J. (C83) 47 [hereinafter TFEU].

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup>Greenberg, *supra* note 40, at 937 ("Such a step...requires a certain amount of political will[.]").

<sup>73</sup>Council Directive 2004/38, chapeau, art 1, 2004 J.O. (L158) 78, 87 (EC) [hereinafter Free Movement Directive].

<sup>74</sup>*Id.* at article 41. ("This Directive shall enter into force on the day of its publication in the Official Journal of the European Union." The date of publication is April 30, 2004).

<sup>75</sup>*Id.* at art. 40.

Article 6 confers a right of residence for EU citizens and their families for up to three months in a Host Member State without any administrative requirements except to hold a valid identity card or passport.<sup>76</sup> Article 7 states that an EU citizen can reside in a Host Member state for longer than three months, so long as: 1) they are workers or self-employed; 2) have “sufficient resources” to not be a burden on the social assistance programs of the host member state and have comprehensive health insurance coverage in the host state; or 3) are a student of a “course of study, including the vocational training,” in the host Member State and have comprehensive health insurance coverage in the host state.<sup>77</sup>

Article 8(4) prohibits Member States from quantifying what qualifies as “sufficient resources,” as each person’s situation should be taken into account.<sup>78</sup> Additionally, “[i]n all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance...or higher than the minimum social security pension paid by the host Member State.”<sup>79</sup> For example, in France a single French or EU Member State citizen without dependents can qualify for Revenue Solidarité Actif (“RSA”) up to 483,24€ monthly when earning 0€ and will continue as long as their monthly income does not exceed the monthly payout maximum.<sup>80</sup> It would seem an attempt by France to use “sufficient resources” as a reason to expel a Romani would be in violation of Article 8(4) as the threshold for qualifying for social assistance in France as a single person without dependents is 0€.<sup>81</sup>

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<sup>76</sup>*Id.* at art. 6.

<sup>77</sup>*Id.* at art 7.

<sup>78</sup>*Id.* at art 8(4).

<sup>79</sup>*Id.*

<sup>80</sup>*Family Benefits Guide 2013*, CAF.fr, 24 (2013),

<sup>81</sup>*Id.* More relevant to the Romani, the RSA monthly benefit for a single person with one dependent is up to 724,86€, while a couple, irrespective of marital status, with one dependent receives up to 869,83€.

Of course, France has not justified the mass expulsions of Romani solely under the “sufficient resources” clause of the Directive.<sup>82</sup> It has also cited “public security” and “public health” exceptions under Article 27 to justify its actions.<sup>83</sup> Manuel Valls has stated that the highly-controversial Romani expulsions which began in 2010 – and continued throughout 2013 – were necessary due to health risks.<sup>84</sup> The Free Movement Directive, however, does not permit a general “health” justification for any individual, let alone blanket expulsion of any particular group. Article 29 states that only diseases with “epidemic potential” as defined by the World Health Organization, such as SARS, tuberculosis, Ebola and plague, are relevant grounds for expulsion on the basis of “public health”.<sup>85</sup> Furthermore, diseases occurring more than three months after arrival in the Host State are not grounds for expulsion<sup>86</sup> and if a person is suspected of having a potentially epidemic disease, a Host Member State may require the person exercising his or her right to residence, *within three months of arrival*, to undergo medical testing and care, “free of charge...to certify that they are not suffering from any of the conditions [that have epidemic potential].”<sup>87</sup> While the living conditions of many Romani in France are deplorable indeed, they do not constitute a “public health” risk as defined by the Free Movement Directive, and, therefore, are not justification for expulsion under Union law. French authorities have claimed that they are evaluating each person individually to determine expulsion (as required by the Free Movement Directive), the European Roma Rights Centre (“ERRC”) observed that,

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<sup>82</sup> *UN Urges France to Avoid Roma Deportations*, *supra* note 47.

<sup>83</sup> Free Movement Directive, art. 27(1). )“Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.”).

<sup>84</sup> *French cabinet under fire over Roma expulsions*, EURACTIV (Aug. 13, 2012), <http://www.euractiv.com/social/europe/new-french-cabinet-fire-roma-exp-news-514281> (“Valls defended the camp evacuations as necessary due to health risks, saying that immigrants were only being repatriated after an individual evaluation of their legal status in France.”).

<sup>85</sup> Free Movement Directive, art. 29(1); World Health Org, *Pandemic & Epidemic Diseases* (2013), [http://www.who.int/csr/disease/WHO\\_PED\\_flyer\\_2013.PDF](http://www.who.int/csr/disease/WHO_PED_flyer_2013.PDF)

<sup>86</sup> Free Movement Directive art 29(2).

<sup>87</sup> *Id.*, art 29(3) (emphasis added).

“[t]he evidence collected by the ERRC [in August and September 2010] suggests that mass expulsions and other expulsions without individual considerations are indeed common place.”<sup>88</sup> The ERRC further observed that, “[a]ll returns reported in the media have involved Roma and [we] have yet to identify a return to Romania or Bulgaria that did not involve Roma.”<sup>89</sup> The ERRC’s observations might be chalked up to mere coincidence if a circular from the French Interior Ministry dated August 5, 2010 had not explicitly stated that, “On July 23, 2010, President [Sarkozy] stated his objective to evacuate illegal settlements: within three months, 300 illegal settlements must be dismantled, with priority on those of the Roma.”<sup>90</sup>

Recognizing a clear violation of EU law, the Commission started infringement proceedings against France for violations the Free Movement Directive. By October, Reding had withdrawn the preliminary proceedings because, “French authorities submitted detailed documentation...[including] draft legislative measures and a credible calendar for putting the procedural safeguards required under the EU’s Free Movement Directive...France has done thus done what the Commission has asked for.”<sup>91</sup> The Commission has not reinstituted proceedings against France despite a high rate of expulsion into 2013.<sup>92</sup>

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<sup>88</sup>Eur. Roma Rights Ctr., *ERRC submission to the European Commission on Violations of EU Law by France* at 2 (Sept. 27, 2010), [www.errc.org/cms/upload/file/france-ec-legalbrief-27-sept-2010.pdf](http://www.errc.org/cms/upload/file/france-ec-legalbrief-27-sept-2010.pdf)

<sup>89</sup>*Id.*

<sup>90</sup>August Circular, *supra* note 53.

<sup>91</sup>Reding Statement, *supra* note 49.

<sup>92</sup>Eur. Roma Rights Ctr., *France Fails on Roma Policy as More Migrants Evicted and Left with Nowhere to Go* (Sept. 27, 2013), <http://www.errc.org/article/france-fails-on-roma-policy-as-more-migrants-evicted-and-left-with-nowhere-to-go/4195> (“Forced evictions of Roma migrants in the third quarter of 2013 have continued at a high rate. The authorities forcibly evicted a total of 5003 people during the third quarter, with a net increase in evictions during the months of July and August 2013”).



## B. France's Violations of the Race Equality Directive – 2000/38

Directive 2000/38 (“Race Equality Directive”) sets forth a, “framework for combating discrimination on the ground of racial or ethnic origin,” within the Member States.<sup>93</sup> The Directive extended then-existing EC legislation that prohibited gender and nationality discrimination to cover all persons and expand the scope of discriminatory practices beyond the employment context into social programs and benefits, housing, education and access to publically available goods and services.<sup>94</sup> Finally, the Directive applies to both the public and private spheres.<sup>95</sup>

There are four types of discriminatory conduct that are prohibited by this Directive: 1) direct discrimination; 2) indirect discrimination; 3) harassment; and 4) “[a]n instruction to discriminate.”<sup>96</sup> The collective expulsions of the Romani and comments made by French officials about the Romani fit into three of the four types of discrimination listed in Article 2 of the Race Equality Directive: direct discrimination, harassment, and instruction to discriminate, which will be discussed in this section.<sup>97</sup>

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<sup>93</sup>Council Directive 2000/34, art 1, 2000 O.J. (L 180) 24 (EC) [hereinafter Race Equality Directive].

<sup>94</sup>*Commission Report on The Application of Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin*, at 1-2, COM (2006) 643 final/2 (Dec. 15, 2006) [hereinafter *Commission Report*].

<sup>95</sup>*Id.* at 2; Directive 2000/43 art. 3.

<sup>96</sup>Directive 2000/43 art. 2.

<sup>97</sup>Indirect discrimination is not easily applicable in the context of Romani expulsions from France because indirect discrimination happens when an, “apparently neutral provision...would put person of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision...is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.” Race Equality Directive, art. 2(2)(b). Neither the Commission, nor the Court has given further guidance on how the definition of indirect discrimination be applied in the context of racial or ethnic discrimination; however, the Commission has noted that the definition of indirect racial discrimination came out of CJEU decisions, such as, *O’Flynn v. Adjudicating Officer*, C-237/94 [1996] E.C.R. I-2631, defining indirect discrimination in the context of free movement of workers. Commission Report, COM (2006) 643 at 2 (citing *O’Flynn*).

In *O’Flynn*, the CJEU found that a funeral costs benefit that only paid for burials taking place in the United Kingdom, irrespective of a person’s immigration status, was indirectly discriminatory towards migrant workers because the condition for burial payment was liable to affect migrant workers more than national workers who wish to bury family members in their Member State of origin and not in the U.K. *O’Flynn*, [1996] ECR I-2638-39, ¶¶ 20-21. Restricting a person’s freedom of movement, regardless of motive or purpose, “cannot be limited by such

## 1. Direct Discrimination

The Directive defines direct discrimination as treating a person “less favorably than another...in a comparable situation on grounds of racial or ethnic origin.”<sup>98</sup> The Commission noted in 2006 that since the implementation of the Directive, most complaints on the Member State level have been in the context of employment and access to goods, services and housing.<sup>99</sup> Since the implementation of the Race Equality Directive, there has not been much judicial activity at the Union level. In *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, one of the handful of Union-level cases involving the Directive, was within the context of discriminatory employment practices<sup>100</sup>. The CJEU stated that public statements by an employer that it would not recruit persons of a particular race or ethnicity constitutes direct discrimination under Article 2(2)(a) because such public statements are, “likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.”<sup>101</sup> Additionally, these public statements give rise to a sufficient presumption that a hiring policy exists and it is for the employer to show that, despite the public statements, in practice such discrimination does not exist.<sup>102</sup>

Indeed, there has not been a CJEU decision about whether public racially discriminatory statements constitute direct discrimination when made by public officials in the immigration

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considerations, which are purely subjective.” *Id.* at para. 21. The Romani expulsions from France are not based on neutral laws that have a discriminatory effect when applied; the laws are applied in a discriminatory manner specifically to the Romani. As will be discussed, this is not indirect discrimination, but direct discrimination, harassment and instruction to discriminate.

<sup>98</sup>Race Equality Directive, art. 2(2)(a).

<sup>99</sup>*Commission Report*, COM (2006) 643 at 3.

<sup>100</sup>*Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, Case C-54/07, 2008 O.J. (C 223) 11(CJEU).

<sup>101</sup>*Id.* at 11-12.

<sup>102</sup>*Id.*

context, but an analogy can be made to those made in the employment context. The employer in *Feryn* in response to a question about his hiring practices being “a bit racist,” stated:

“I must comply with my customers’ requirements. If you say ‘I want that particular product or I want it like this and like that’, and I say ‘I’m not doing it, [but] I’ll send those people’, then you say, ‘I don’t need that door.’ Then I’m putting myself out of business. We must meet the customers’ requirements. This isn’t my problem. I didn’t create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? I must do it the way the customer wants it done!”<sup>103</sup>

Such comments were found by the Court to be direct discrimination, even if there was no individual complainant. According to the Court, in this context, direct discrimination is not dependent on the existence of a complainant who claiming to be the victim of discriminatory hiring practices.<sup>104</sup> The Court noted that such statements would dissuade certain people from applying for the job, which hinders their access to the labor market.<sup>105</sup> Unhindered access to the labor market is implied by the provisions of Article 45 TFEU, which states that, “[f]reedom of movement for workers shall be secured within in the Union...[s]uch freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States[.]”<sup>106</sup>

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<sup>103</sup>*Id.* at 22.

<sup>104</sup>C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, Judgment of the Court (Second Chamber) ¶24-¶25, July 10, 2007, <http://curia.europa.eu/juris/celex.jsf?celex=62007CJ0054&langl=en&type=NOT&ancre=> (“The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim.”)

<sup>105</sup>*Id.*

<sup>106</sup>TFEU art. 45.

The CJEU's *Feyrn* reasoning leads to the following questions: if such public statements about an employer's hiring practices constitute a violation of the Race Equality Directive, then wouldn't Manuel Valls' statement that the Romani, "have a duty to return to their homeland"<sup>107</sup> be a violation of the Race Equality Directive?

On the one hand, such statements would certainly have the effect of dissuading EU citizens of Romani background from entering France, thus hindering their free movement rights, because, as Manuel Valls put it, "[France doesn't] have the obligation to welcome [the Romani], we need to say it clearly and calmly. It is not about stigmatizing a population, but facing the truth."<sup>108</sup> To be sure, Viviane Reding, in response to Manuel Valls' statements, questioned the timing of these statements – before municipal elections<sup>109</sup> – and noted that France is bound the Free Movement Directive.<sup>110</sup> Under the Court's reasoning *Freyn*, an individual could argue that he or she was directly discriminated against by France because the public comments "dissuaded" him or her from exercising their free movement rights and refrained from traveling to France. On the other hand, however, Valls' is not an employer and his statements about the Romani are likely protected speech under French and EU law irrespective of the effect the statements may have. Furthermore, knowledge of France's institutionalized racial hostility towards the Romani does not necessarily prevent any particular Romani from traveling to France.

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<sup>107</sup> *French Official Says Roma Should "Return to Homeland,"* ASSOCIATED PRESS (Sept. 25, 2013), <http://www.usatoday.com/story/news/world/2013/09/25/roma-france/2868931/>.

<sup>108</sup> *Id.*

<sup>109</sup> *Reding Slams France For Using Roma As Election Scapegoats*, EURACTIV (Sept. 26, 2013), <http://www.euractiv.com/elections/reding-slams-france-roma-electio-news-530711>. ("If I am not mistaken, elections are in the air in France. Whenever in this country [the government] doesn't want to talk about important things like the budget or debt, they talk about the Roma.")

<sup>110</sup> *Id.* ("We have European rules that were signed by France, the rules on the free movement of EU citizens. And we are not speaking about Roma, but about individuals. Only upon a decision by a judge they can be repatriated, if they did something that goes against the laws of the State in question.")

## 2. Harassment

The Race Equality Directive's harassment definition can be broken down into its four parts: 1) unwanted conduct; 2) related to racial or ethnic origin; 3) [which] takes place with the purpose or effect of violating the dignity of a person; and 4) creating an intimidating, hostile, degrading, humiliating or offensive environment."<sup>111</sup> France has violated the Race Equality Directive. That conclusion seems obvious, but legal arguments are not won with conclusory statements, especially when there is no guiding case law on "harassment".

First, expulsion, by its very nature, is "unwanted conduct:" no person would welcome or desire forcible eviction.<sup>112</sup> Nonetheless, the act of expulsion itself is not harassment and is allowed by Union law under certain circumstances.<sup>113</sup> But the Romani expulsions from France are "related to racial or ethnic origin." The August Circular specifically states that Romani camps are priority targets for expulsion.<sup>114</sup> Manuel Valls has stated publically that the Romani are not welcome in France.<sup>115</sup> President Sarkozy has also made statement about the need to target the Romani in France.<sup>116</sup>

As a result of these statements and policies by State officials, an "intimidating, hostile, degrading, humiliating [and] offensive environment" has been created for the Romani in France, although it is more accurate to state that the hostile environment has been made even more hostile in the wake of the racist rhetoric from State officials in recent years. For example, in

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<sup>111</sup>Race Equality Directive, art 2(3).

<sup>112</sup>See Black's Law Dictionary, 9<sup>th</sup> Edition (2009) ("An ejection or banishment, either through depriving a person of a benefit or by forcibly evicting a person.").

<sup>113</sup>See *supra*, Part III(A)(1) and accompanying notes.

<sup>114</sup>August Circular, *supra* note 53.

<sup>115</sup>*French Official Says Roma Should "Return to Homeland," supra* note 107.

<sup>116</sup>Fichter, *supra* note 47.

Marseille, people set fire to a Romani camp in September 2012.<sup>117</sup> In June 2013, a Molotov cocktail was thrown into a Romani camp outside Hellemes.<sup>118</sup> French mayors have stated publically their disdain for the Romani, with the Mayor of Chotlet saying, “Maybe Hitler did not kill enough.”<sup>119</sup> It is difficult to imagine that a combination of mass evictions and hateful words from government official would not have the, “effect of violating the dignity” of any individual Romani. The ERRC notes that Romani are aware of the anti-Romani rhetoric.<sup>120</sup> In addition, statements given by affected Romani to Amnesty International convey the uncertainty and desperation surrounding the forced evictions:

- “It’s very hard to move from place to place. We can’t even stay for a bit. As soon as I hear I’m going, it’s like, I feel my heart ache.”<sup>121</sup>
- “I don’t know how long we will stay here, as long as possible; I would like to have a more stable life, but there’s no chance. I don’t like this kind of life, I can’t work, I can’t find a house; we have no papers. I would just like a normal life.”<sup>122</sup>
- “I don’t know how long we are going to stay here, I’m afraid because I don’t know when the eviction is going to happen. I expect it every day. It’s hard for the children.”<sup>123</sup>

The European Committee of Social Rights (“ECSR”) has held that, “the conditions in which the forced evictions of Roma camp sites take place are *inconsistent with human dignity* and constitute a violation [of the European Social Charter].”<sup>124</sup>

<sup>117</sup>*Vigilantes Burn Roma Camp in Marseille, France*, BBC (Sept. 28, 2012), <http://www.bbc.co.uk/news/world-europe-19756468>.

<sup>118</sup>Eur. Roma Rights Ctr, *ERRC Condemns Hitler Hate Speech Against Roma* (July 23, 2013), <http://www.errc.org/article/errc-condemns-hitler-hate-speech-against-roma/4173>.

<sup>119</sup>*Id.*

<sup>120</sup>Eur. Roma Right Ctr., *ERRC submission to the European Commission on Violations of EU Law by France*, 3 (August 2010), <http://www.errc.org/cms/upload/file/france-ec-legalbrief-27-august-2010.pdf> (“Returnees were aware of the government rhetoric”).

<sup>121</sup>Amnesty Int’l, *France: Protect Against Forced Evictions* (Nov. 11, 2012), <http://www.amnesty.org/en/news/france-protect-against-forced-evictions-2012-11-29>.

<sup>122</sup>Amnesty Int’l, *Told to Move On: Forced Evictions of Roma In France*, Index EUR 21/007/2013, 11 (Sept. 2013), <http://www.amnesty.org/en/library/asset/EUR21/007/2013/en/8717ca62-2598-46d0-83d1-1b958054e675/eur210072013en.pdf>

<sup>123</sup>*Id.* at 14

<sup>124</sup>ERTF v. France, *surpa* note 5, at ¶135 (emphasis added).

### 3. *Instruction to Discriminate*

The Race Equality Directive simply states that an instruction to discriminate on racial or ethnic grounds is in violation of the Directive<sup>125</sup>. The Commission has not elaborated further on the “who, what, where and when” of this particular provision, nor has the CJEU had an opportunity to define its parameters.<sup>126</sup> Under principles of “complicity and liability,” the Court of Cassation in France has held unlawful discrimination occurs when a landlord instructs a real estate agent not to rent a property to people with “foreign origin” last names.<sup>127</sup> Indeed, the August Circular instructs gendarmes and mayors to prioritize the evacuation of Romani camps.<sup>128</sup> While there is a dearth of relevant guidance defining the parameters of an “instruction to discriminate,” the instructions of the August Circular likely rise to the level of an “instruction to discriminate” on racial or ethnic grounds as the statement clearly singles out a particular ethnic group.

### C. *The Limitations of Adjudicating Fundamental Rights*

The Charter of Fundamental Rights of the European Union (“the Charter”) was proclaimed in 2000, but only became legally binding on the Member States in 2009 under the Treaty of Lisbon.<sup>129</sup> In essence, the Charter enshrines CJEU case law, the principles of the

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<sup>125</sup>Race Equality Directive, art 2(4).

<sup>126</sup>Icelandic Human Rights Centre, *European Union Directives on the Prohibition of Discrimination*, <http://www.humanrights.is/human-rights-and-iceland/equality--non-discrimination/> (last visited Nov. 19, 2013). (“Instruction to discriminate on protected grounds is deemed to constitute discrimination, even if no definition is provided by the directives. The European Court of Justice will have to clarify this concept, especially whether it has to be a mandatory instruction or if incitement or expressed preference to treat less favourably someone on protected grounds is sufficient to constitute discrimination.”).

<sup>127</sup>Eur. Comm., Directorate-Gen. for Emp’t, Social Affairs and Inclusion, *Developing Ant-Discrimination Law In Europe* (2009) 30 (citing Court of Cassation, Criminal Chamber, 7 June 2005, no. 04-87354).

<sup>128</sup>*Supra* note 91 and accompanying discussion.

<sup>129</sup>Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities art. 1(8) Dec. 13, 2007, 2007 O.J. (C 306) 13 [herein after Treaty of Lisbon].

ECHR, and the common values on fundamental rights in the Member States.<sup>130</sup> It prohibits collective expulsion<sup>131</sup>, racial discrimination<sup>132</sup> and protects the freedom to move and reside within the territory of the Member States.<sup>133</sup> As EU law, it applies to every citizen of the Union. This would seem like a boon to Romani rights advocates in the EU; it's the magic wand of equality for EU citizens! How could the Commission or the CJEU not possibly want to declare that every member state has violated the Charter in its treatment of the Romani?

While the Charter is a step forward in uniformly protecting fundamental rights across the Union, it is not the warm blanket of EU equality it holds itself out to be. Article 51 of the Charter does not, “extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union or modify powers and tasks as defined in the Treaties.”<sup>134</sup> In essence, the Charter’s protections do not apply in situations that do not implicate the competences of the Union and Union law as set out in the Treaties.<sup>135</sup> Member States advocate a narrow reading of Article 51 to avoid “competence creep via judicial action,”<sup>136</sup> and look to the Commission and secondary legislation to limit the application of fundamental rights in cases before the CJEU, particularly in the areas of family law and immigration.<sup>137</sup> The CJEU’s recent EU citizenship case law continues to tie EU citizenship rights to those citizens who move throughout the Union.<sup>138</sup> Fundamental rights do not stand on their own before the

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<sup>130</sup>Eur. Comm, *Why The EU Charter of Fundamental Rights Exists*, <http://ec.europa.eu/justice/fundamental-rights/charter/> (last visited Dec. 6, 2013).

<sup>131</sup>Charter of Fundamental Rights of the European Union art 19, Dec. 3, 2010, 2008 O.J. (C 83) 395 [hereinafter Charter of Rights].

<sup>132</sup>Charter of Rights art 21.

<sup>133</sup>Charter of Rights art. 45.

<sup>134</sup>Charter of Rights art. 51.

<sup>135</sup>TFEU art. 2-6

<sup>136</sup>C.M.A. McCauliff, *EU Citizenship: Why Can't the Advocates General Keep Shelia McCarthy's Family Together?*, 36 FORDHAM INT'L L. J. 1372, 1413 (2013).

<sup>137</sup>*Id.* at 1378.

<sup>138</sup>*Shelia McCarthy v. Sec'y of State for the Home Dep't*, Case C-434/09, [2011] E.C.R. I-03375, ¶ [49] (holding that the deportation from the UK of Mrs. McCarthy's husband, a Jamaican national, did not interfere with her substantive rights as an EU citizen).



CJEU when it comes to the internal measures of a Member State, which leaves the non-mobile majority outside the protection of EU citizenship rights.<sup>139</sup>

Where do these limitations leave the Romani in the context of collective expulsions? Is moving from Romania or Bulgaria to France enough of to trigger EU law and the protections of EU citizenship? Or are the Romani expulsions an internal measure adopted by a Member State to protect its budgetary and public safety interests and therefore outside of the competence of EU law? At the very least, France has violated the *spirit* of both the Free Movement and Race Equality Directives in collectively expelling EU citizens simply because of their race. Though, if the Commission is to be taken at its word, France has done more than violate the *spirit* of those Directives. Does the Commission see the Charter, by way of its parallel protections under the Directives, as a siren call or the sword of Damocles?<sup>140</sup> Its public statements about the Romani situation say, “siren call,”<sup>141</sup> while its actions, or rather, inaction, says, “sword of Damocles.” As a result, the Commission has been ineffective in advancing Romani rights and should be held accountable to the people it serves.

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<sup>139</sup>Jörg Polakiewicz, *EU Law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?, The Draft Accession Agreement of 5 April, 2013* 8 (unpublished manuscript) (Sept. 26, 2013), <http://ssrn.com/abstract=2331497> (“Instead of choosing a holistic human rights approach which would comprehensively address existential fundamental rights problems, the [CJEU’s] approach privileges a mobile minority.”).

<sup>140</sup>McCauliff, *supra* note 136, at 1378. (“Now, however, the court is at a crossroads because it has before it the [Charter] dangling before it as both the sword of Damocles and a siren call.”).

<sup>141</sup>*But see*, ERTF v. France, *supra* note 5, at ¶54. In July 2011, a Commission spokesperson stated that the issue of, “expulsions of nationals of EU member states fell ‘exclusively within the jurisdiction of member states’ and, consequently, within the member states’ obligations under *international law*,” after Human Rights Watch submitted a report to the Commission concerning the incompatibility of the Romani expulsions with EU law. This statement is unfortunate. It is contrary to what Viviane Redig has publically stated about the legality of the expulsions under EU law, but also consistent with the limitations of the Charter.

### PART III VINDICATING ROMANI RIGHTS?

Romani discrimination cases have been brought to the attention of various adjudicatory bodies like the European Court of Human Rights (“ECtHR”) and the European Committee of Social Rights (“ECSR”). In *D.H. v. Czech Republic*, the ECtHR found that the Czech Republic illegally segregated Romani school children and is often compared to *Brown* by Romani rights advocates.<sup>142</sup> In *ERTF v. France*, the ECSR held that France’s collective expulsions of the Romani are a violation of the European Social Charter.<sup>143</sup> These cases are certainly important contributions to the academic evaluations of the Romani cause, but they do not have the force of law capable of bringing material change like *Brown* because the ECtHR and the ECSR do not have the enforcement power of the Supreme Court or the CJEU. Professor Greenberg’s recent research indicates that the *D.H* decision has not materially changed school segregation in the Czech Republic. “The Czech Republic’s response to D.H. has been a series of studies, but no action,” and Romani school children are disproportionately represented in “special schools” and continue to have low rates of scholastic achievement.<sup>144</sup> The ERTF decision was delivered in June 2012, but as this paper has continuously noted, France has not stopped collectively expelling Romani, with the ERRC noting an *increase* in expulsion in 2013,<sup>145</sup> in violation of the ECSR decision – and EU directives.

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<sup>142</sup>D.H., *supra* note 65 (holding that the Czech Republic illegally segregated Romani school children); see Greenberg, *supra* note 40, at 940. (“[Roma rights advocates] hailed [D.H.] as Brown’s European equivalent.”); Andrea Coomber, *Strategically Litigation Equality – Reflections on a Changing Jurisprudence*, 15 EUR. ANTI-DISCRIMINATION L. REV 13, 18 (2012). (“Perhaps the most important aspect of D.H. is that the experience of Roma children in Central Europe was ‘heard’, just as the victims of education racial segregation in the USA were ‘heard’ by the Supreme Court.”).

<sup>143</sup>ERTF v. France, *supra* note 5 (holding that France’s expulsions of the Romani violate the European Social Charter).

<sup>144</sup> Greenberg, *supra* note 40, at 941.

<sup>145</sup>Eur. Roma Rights Ctr., *France Fails on Roma Policy as More Migrants Evicted and Left with Nowhere to Go* (Sept. 27, 2013), <http://www.errc.org/article/france-fails-on-roma-policy-as-more-migrants-evicted-and-left-with-nowhere-to-go/4195> (“Forced evictions of Roma migrants in the third quarter of 2013 have continued at a high rate.

A case like *D.H.* or *ERTF*, in which an individual or a NGO on behalf of affected Romani, respectively, has not been brought before CJUE despite Member States' continued violations of EU law. This absence is attributable to a number of factors: lack of jurisdiction, historical function as an "economic" court, and procedural hurdles.

First, as noted, the CJEU's competence to hear "fundamental rights" cases has been limited under Article 51 of the Charter and Member States have worked hard to avoid "competence creep" of the Court into matters they consider "internal," such as immigration and family rights issues.<sup>146</sup> Furthermore, the CJEU is a newcomer to the fundamental rights arena with the entry into force of the Charter in 2009 under the Treaty of Lisbon. Historically, the CJEU's role has been to, "[create and maintain] a system of economic...governance, in which human rights play an important part, but only a part."<sup>147</sup> As the saying goes, "old habits die hard," and since the Charter's entry into force, the Court's case law shows a trend towards interpreting the Charter in isolation from external developments of human rights law, with one statistic showing a decline in citations to the ECHR and ECtHR decisions.<sup>148</sup>

Finally, procedural limitations of the CJEU keep it from being a proper human rights adjudicator capable of bringing change for vulnerable groups like the Romani. Professor de Búrca argues that since the CJEU does not make it simple for third party intervenors with, "relevant human rights experience and expertise...to participate in proceedings before [it] that

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The authorities forcibly evicted a total of 5003 people during the third quarter, with a net increase in evictions during the months of July and August 2013").

<sup>146</sup>McCauliff, *supra* note 136, at 1378.

<sup>147</sup>Christopher McCrudden, *Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights* 407 (2013) (unpublished manuscript) (on file with author).

<sup>148</sup>Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator*, 20 Maastricht J. Eur. & Comp. Law (forthcoming 2013) (manuscript at 6).

raise human rights questions,”<sup>149</sup> its case law risks becoming a detached and “insufficiently informed” on the growing range of human rights issues.<sup>150</sup>

But I would also argue that the CJEU’s procedural prohibition on individual “failure to act” actions under Article 256 TEFU against the Commission does nothing for advancing fundamental rights. France’s expulsions of the Romani illustrate the void created by the CJEU’s prohibition of such actions. If the Court wants to give any meaning to the Charter’s principles, it must evolve its approach to encompass non-economic human rights concerns that invariably occur as the EU attempts to expand its competence beyond economics.

As previously noted, the Commission began infringement proceedings against France for the 2010 expulsions, but then back-tracked claiming it was “satisfied” that France would amended its laws to better incorporate the procedural safeguards outlined in the Free Movement Directive and would continue to monitor France and other Member States with respect to Romani expulsions.<sup>151</sup> If the France’s expulsions had slowed down dramatically or ceased after the Commission had dropped infringement proceedings against France the 2010, they would be relegated to a history lesson about state-sponsored racism. But France continued to persecute the Romani and State officials like Manuel Valls called for their expulsion.<sup>152</sup> The situation for the Romani in France has not changed and neither has France’s policies.

If the Commission is unwilling to use its enforcement power against France, can an individual bring a complaint before the CJEU? In theory, the answer is yes. First, an individual can bring a claim against France for violations of both the Freedom of Movement and Race

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See discussion *supra* Part I(C) and accompanying notes.

<sup>152</sup> *French Minister Valls Defends Calls for Roma Expulsion*, *supra* note 59.

Discrimination directives and hope the local court refers the case to the CJEU for a preliminary ruling on the compatibility of his or her particular expulsion order and procedure with EU law.<sup>153</sup>

Article 265 TFEU states that, “[s]hould the...Commission...in infringement of the Treaties, fail to act, the Members States...may bring an action before the Court of Justice of the European Union to have the infringement established.”<sup>154</sup> It goes on further to state that, “[a]ny natural[] person may....complain to the Court that an institution...of the Union has failed to address to that person any act other than a recommendation or an opinion.”<sup>155</sup>

A literal reading of the treaty requires a person to first make a formal complaint to the Commission. After two months, if the Commission does not, “does not define its position,” then the complainant may file a complaint with the CJEU.<sup>156</sup> Unfortunately, the CJEU has not taken a literal reading of the treaty and has repeatedly rejected individual actions against the Commission for “failure to act”. In *Concal v. Commission*, the Court stated that it is, “settled case-law that an action for failure to act is inadmissible where it is brought by a natural or legal person for a declaration that, by not initiating an action for failure to fulfill obligations against a Member State, the Commission has, in breach of the [TFEU], failed to act.”<sup>157</sup> The Court requires that for an individual to have standing to assert a failure to act by the Commission, the Commission must have a legal obligation to act.<sup>158</sup> Logically, the CJEU’s position makes sense.

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<sup>153</sup> TFEU art. 267.

<sup>154</sup> TFEU art. 265.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Concal v. Commission*, Case C-570/12 P, [2012] E.C.R. I \_\_\_\_ ¶ [4] (delivered June 27, 2012) (citing Case 247/87, *Star Fruit v Commission* [1989] E.C.R. 291), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CO0570:EN:HTML>

<sup>158</sup> *Mugraby v. Council of the European Union and European Comm.*, Case C-581/11, [2012] E.C.R. I \_\_\_\_ ¶ [17]-[19] (delivered July 12, 2012), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=127522&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=553677>; *Ryanair v. Commission*, Case C-615/11, [2013] E.C.R. I \_\_\_\_ ¶ [15] (delivered May 16, 2013), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=137426&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=61680>.

It is not in the business of making EU bodies behave in a certain way simply because a person is unhappy with how a particular law has or has not been applied to their individual situation absent a legal obligation. The Commission cannot “fail to act” if it is not required by law to act.

In the case of France’s expulsions of the Romani, the Commission has certainly stated that France has violated its obligations under EU law and has even start infringement proceedings against it, but nowhere in the Race Equality Directive or the Freedom of Movement Directive is there an obligation for the Commission to bring proceedings against a Member State that violates or incorrectly applies the those directives; such an action is discretionary on the part of the Commission, no matter how morally repugnant France’s actions continue to be.

It is unfortunate that the CJEU has interpreted Article 265 in a way that does not allow individuals bring a claim against the Commission in the highest court in the Union. While acknowledging the logical and legal grounds of the Court’s position, it is insufficient in the face of horrific institutionalized persecution by Member States. If the Commission and the CJEU have neither the will, nor the jurisdiction to protect the most vulnerable and mistreated members of EU society, or at least allow the possibility for individuals to seek a legal remedy from the EU, why bother to make the Charter legally binding if it is going to be relegated to an aspirational set of principles? When the Charter became legally binding in 2009, each Member State was already a party to the European Convention on Human Rights ECHR and had fundamental rights written into their national constitutions. There is a void legal substance and procedure of the EU that needs to be filled if the Romani are to ever have their *Brown*.

## CONCLUSION

It is unfortunate that the current EU mechanisms do not allow Romani to bring suit against the Commission. It is a tragedy that the Commission lacks the political will to institute infringement proceedings against France for its collective expulsions of Romani.

While laudable, it is not enough for EU officials to denounce France's actions or hold up an optional policy initiative aimed at gradually integrating the Romani into larger society.<sup>159</sup> Social change does not happen overnight and while there should be policy goals for its achievement, the courts, as in *Brown*, need to play a role in enforcing the laws and ensure they are not a vehicle for abuse by officials. The problem of EU citizenship is that the Charter is not enforceable on its own through individual action and this gap needs to be filled to protect people like the Romani: those who are preyed on by society and continually see their fundamental rights violated by the State. The Charter is a false promise of equality on the EU level if it cannot be enforced.

The plight of the Romani across Europe is indeed a disgrace. France will continue to round up the Romani and transport them en masse out of France. No one with any authority is doing anything to stop it and these EU citizens cannot seek legal redress on their own from the EU to affect broader change à la *Brown*. The value of the Charter and EU citizenship are meaningless if Member State behavior reminiscent of Nazi-era Germany goes unchecked by EU authorities.

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<sup>159</sup>*Roma Integration Strategy*, *supra* note 4. Ironically, France has signed the Roma Integration Strategy, yet has not used any of the €50 billion available to member states to provide services to the Romani living within its borders, as Viviane Reding has noted. See *Reding Slams France For Using Roma As Election Scapegoats*, *supra* note 109. If the EU is willing to bank roll Romani integration and Member States still would rather discriminate than integrate, the situation of the Romani is not an "internal" situation that threatens a Member States' budget, but reflective of a base desire to rid "these people" from broader society.

